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2018/01272/C1 & 2018/01274/C1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Friday 22nd February 2019

B e f o r e:

LORD JUSTICE DAVIS

MRS JUSTICE LAMBERT DBE

and

SIR KENNETH PARKER

_____

R E G I N A

- v -

BRIAN LESLIE NURDON

_____

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Miss J Cox appeared on behalf of the Appellant

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J U D G M E N T

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Friday 22nd February 2019

MRS JUSTICE LAMBERT:

1. In September 2017 the appellant was tried in the Crown Court at Cardiff on an indictment containing 25 counts. All of the offences alleged were sexual in nature. The appellant was convicted by the jury of one offence of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. He was found not guilty of 19 other counts, and the jury were unable to reach a verdict on a further five counts. The Crown sought a retrial on those counts upon which the jury had been unable to reach a verdict.

2. Following the retrial, on 14th March 2018 the appellant was convicted of three counts of indecent assault and two counts of rape.

3. For these six offences, the appellant was sentenced to a total term of imprisonment of eighteen years: twelve years' imprisonment for each of the two offences of rape, each term to be served concurrently, and eighteen months' imprisonment for each of the four offences of indecent assault, each term consecutive to the others and consecutive to the term of imprisonment imposed for rape.

4. The appellant now renews his application for leave to appeal against his convictions, following refusal by the single judge; and he appeals against the sentences imposed in respect of the convictions for indecent assault with the leave of the single judge.

5. The appellant is now aged 68. The convictions relate to historical sexual offending dating back to a period between 1979 and 1985. At that time the appellant would have been aged between around 29 and 35 years. The appellant was then living with his partner and young daughter in Albany Street in Newport in Wales. His victims are now middle-aged women but were then aged between 13 and 17 years. "SB" was the victim of the indecent assault of which the appellant was convicted in the first trial. She was 17 years old at the time of the offence; "DE" was the victim of indecent assault of which the appellant was convicted at the re-trial. She was between 13 and 15 years old at the time of the offence. "HL" was the victim of two of the counts of indecent assault, both committed when she was aged between 13 and 15 years, and the victim of the two rape offences which were committed when she was aged 14.

6. The three girls all lived locally to the appellant. The girls would go to the appellant's home when playing truant from school and would watch television, listen to music and drink alcohol out of sight of their parents. The convictions related to offences committed by the appellant in that house, in his car and in his camper van.

Appeal Against Conviction

7. We deal first of all with the renewed application for leave to appeal against conviction. The grounds relate to the convictions in respect of DE and HL. The appellant was found not guilty by the jury of nine of the counts which related to DE at the first trial. The appellant argues that the judge was wrong to rule that the previous acquittals in relation to the victim DE were inadmissible in the retrial and that therefore his conviction for indecent assault of DE was unsafe. He also submits that the judge was wrong to reject the submission of "no case to answer". This ground, therefore, challenges not only the conviction for indecent assault of DE, but also the convictions concerning HL.

9. We have read the grounds of appeal and the supporting documents with care. We deal first with the argument that the judge was wrong not to permit the acquittals to be adduced before the jury in the second trial.

10. Previous acquittals are inadmissible, save in exceptional circumstances. The reason for such a restrictive approach is because the verdict of a different jury at an earlier trial is evidence only of that jury's opinion and is not therefore relevant; also in most instances it will not be possible to be certain why a jury has acquitted the defendant, leading to the real danger that if the jury were to be told of a previous acquittal then it may be

distracted from its task of determining the case on the basis of the evidence before it. In R v Deboussi [2007] EWCA Crim 684 the court set out the general rule and underlying rationale; it approved the commentary in Archbold that, exceptionally, a jury may be told of a previous acquittal but only where there is clear evidence from a verdict that the jury had not believed a witness and that that witness's credibility was directly in issue in the subsequent trial. If these circumstances exist, then the court should then stand back and consider whether fairness to both sides requires the jury to know of the previous acquittal.

11. We do not find that such exceptional circumstances exist in this case. We do not accept that the inevitable and clear inference to be drawn from the jury's acquittals in the first trial is that the jury rejected the evidence of DE and found her to be an untruthful witness. There are a number of reasons why the jury may have returned not guilty verdicts including the possibility that there was a doubt about her age at the relevant time or because she was referring to events which had taken place many decades earlier. Also, the judge directed the jury in the first trial that they should consider each count separately and so there may have been different reasons for acquitting the appellant on different counts. If the acquittals had been adduced, there would have been a real risk that, at the second trial, there would be satellite arguments from issues which arose, not least because the jury may have been told that there was another batch of offences in respect of which the jury had been unable to reach a conclusion. For this reason, the fact of the earlier acquittals would have been, we find, a dangerous distraction. Accordingly, we do not grant leave on that ground of appeal.

12. The appellant's second ground of appeal is that the judge was wrong to allow the trial to proceed beyond the close of the prosecution case because the evidence which had been given by DE and HL about their ages at the time when sexual activity took place was tenuous and inconsistent. This court accepts that evidence concerning the ages of the two victims was relevant to the issue of consent. We note, however, that both victims asserted that they were under the age at which they could have consented lawfully to sexual activity of the sort alleged. Also, the allegations against the appellant related to a course of conduct over time. It seems to us that the points which the appellant makes in his grounds of appeal concerning for example contradictions in the evidence are, as the judge obviously concluded, matters ultimately for the jury's determination at the end of the trial. We do not, therefore, grant leave in respect of this ground either.

13. Accordingly, the renewed application for leave to appeal against conviction is refused.

Appeal against Sentence

14. We turn, therefore, to the appeal against sentence.

15. The judge sentenced the appellant to eighteen months' imprisonment for the indecent assault upon DE. The offence had been committed when she was between 13 and 15 years old. It involved the use of fingers and a fist to penetrate her vagina. In arriving at eighteen months, the judge recorded that the maximum sentence he could impose was one of two years' imprisonment, and that the offence, viewed in isolation, justified the maximum sentence available. He reduced the sentence to eighteen months because he intended to impose a series of consecutive terms. He was conscious to observe the principle of totality, that is, he had to ensure that the total term of imprisonment truly reflected overall the extent of the appellant's criminality.

16. The judge took a similar approach to sentence for all of the indecent assaults, that is, that they all justified the maximum available sentence of two years' imprisonment, but there should be a reduction because he intended to impose consecutive sentences for each assault, each to run consecutively to the sentences for the two rapes. He noted the details of the offence against SB, who was 17 years old, which involved the appellant digitally penetrating her vagina when she was asleep on a sofa in his home. The two offences of indecent assault against HL, who was between 13 and 15 years old at the time, involved the insertion of a vibrator and the insertion of a snooker cue. Both of these counts were specimen counts.

17. The judge sentenced the appellant to twelve years' imprisonment for each count of rape in respect of HL, each term to run concurrently. He considered the sentencing guidelines relevant to the modern legislation and agreed with the appellant's counsel that each offence fell within category 2A. In reaching that categorisation, he took into account that the victim had suffered severe psychological harm and that she was very vulnerable by reason of her age and the location of the offending, which was committed in a quiet place far away from her family. He gave consideration to raising the categorisation to category 1, but he concluded that, having regard to the offending in the round, this would not be justified. In reaching the sentence of twelve years within the guideline

range of nine to thirteen years, he made clear that he had made a downward adjustment for totality to reflect the overall sentence which he intended to impose.

18. There are three grounds of appeal. The first is that in imposing the same sentence for each of the individual offences of indecent assault, the judge failed to take into account the significant differences between the individual offences. Those differences included the ages of the victims and the incidents themselves which varied in gravity. The assault on SB involved the brief insertion of a finger; those on HL involved the insertion of a vibrator and a snooker cue; and those on DE involved the insertion of a fist.

19. We recognise that the judge did not differentiate between the individual circumstances of the offences, as he could have done. However, in our view, that factor in itself did not lead to the overall sentence being manifestly excessive. There may be force in the submission that the sentence for the assault on SB ought to have been lighter than that for the other two offences which involved younger victims and more serious assaults. But any difference would have been marginal, and that same differentiation could have been reflected in a rather higher sentence on the counts relating to DE and HL.

20. It is clear from his comments that, throughout the sentencing process, the judge had at the forefront of his mind the overall sentence of imprisonment which he was imposing, rather than the individual components. We see nothing wrong in principle with that approach in a case of this nature.

21. It is with this in mind that we address the second and third grounds of appeal. These grounds assert that consecutive sentences should not have been passed for the two indecent assaults on HL and that those two sentences should have been ordered to run concurrently with the sentences imposed for rape. The appellant's argument is that in sentencing the judge should have reflected that the indecent assaults were all part of a series of offending of a similar kind committed against the same person over a similar period of time. As Miss Cox recognises, the second and third grounds of appeal are, in effect, a challenge to the sentence of imprisonment which was imposed for the offences against HL of fifteen years. Her submission is that that was manifestly excessive when judged against the overall criminality involved.

22. We do not agree. The appellant's offending involved the insertion of dangerous, hard objects and therefore additional degradation and humiliation. The victim, as the judge found having heard her give evidence, suffered serious psychological harm. She was vulnerable by reason of her age. Further, the offending took place over a two-year period and covered the victim's early teenage years. The judge found that the effect of the trauma overall had been serious and long-lasting. The victim had made two suicide attempts, also whilst a teenager. Although she had done what she could to put the events behind her, she had been unable to do so. Taking these features into account, our view is that the appellant's overall criminality justified a sentence of fifteen years' imprisonment. If, as submitted by Miss Cox this morning, the judge should have ordered the sentences for the two indecent assaults to be served concurrently with the sentences for rape, the judge would have then been justified in increasing the sentence of imprisonment which he ordered for the two rape convictions. Our view is that, if he had ordered the sentence to be served concurrently, the judge would have been justified in imposing a sentence of fifteen years' imprisonment to reflect two rapes and two serious indecent assaults on a young teenage victim.

23. No challenge is made to the imposition of consecutive terms for the offences of indecent assault against the appellant's other two victims. This concession is properly made, given the Sentencing Council Guidelines. We do not accept that the sentence imposed of eighteen years' imprisonment was inconsistent with the appellant's overall criminality. We accept that the sentence was a high sentence, but we do not find that it was manifestly excessive.

24. Accordingly, the appeal against sentence is also dismissed.

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